Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Communications Assistance for Law Enforcement Act	CC Docket No. 97-213

REPLY COMMENTS REGARDING CALEA MANUFACTURER REVENUE ESTIMATES

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SUMMARY

The carriers continue to urge the Commission to permit the J-Standard to remain deficient because correcting its deficiencies would violate an undefined, non-statutory requirement that compliance with CALEA must not cost "too much." The Commission should decline this invitation to ignore its clear statutory mandate. Cost information can be relevant to the Commission's task to the extent that it can help the Commission identify the least expensive methods — *i.e.*, the methods that are "cost-effective" and will "minimize" the cost of compliance on ratepayers — of curing particular deficiencies in the J-Standard, but it cannot rewrite the statute such that the Commission's standards need not "meet the assistance capability requirements of section 103" at all. CALEA § 107(b)(1). The aggregated revenue estimates appended to the Commission's Public Notice cannot assist the Commission in choosing between alternative methods of crafting a rule that will meet the requirements of Section 103, and thus cannot assist the Commission in fulfilling its statutory responsibility in this proceeding.

Should the Commission nevertheless determine that these data are relevant to its task, it should, as the government and an industry commenter suggest, afford interested parties a more meaningful opportunity to comment on the data. Even if it does not do so, however, the Commission should note that on the present record the carriers' underlying premise — that requiring the punch list capabilities would place undue financial burdens on them — must be rejected.

DISCUSSION

Introduction

On May 7, 1999, the Commission's Office of Engineering and Technology released a Public Notice setting forth aggregations of several manufacturers' estimates of projected revenues related to the implementation of the Communications Assistance for Law Enforcement Act (CALEA), and requesting public comment on them. The government, along with several telecommunications carriers and industry groups, filed comments on May 17, 1999. The government now submits these reply comments addressing issues raised in the other filed comments.

I. Congress Has Not Authorized The Commission To Delete Assistance Capability Obligations From CALEA On The Ground That They Would Cost "Too Much."

In their comments on the Commission's Public Notice, the carriers continue to urge the Commission to exercise a power that is nowhere to be found in CALEA: the power to cut assistance capabilities mandated by Section 103 out of CALEA on the ground that they would, according to an undefined standard that is not articulated in the statute, cost "too much." U S West Comments 1; see also PrimeCo Comments 5; AirTouch Comments 3; CTIA Comments 1. These carriers overlook the fact that, while it directed the Commission to establish a rule that used "cost-effective" means of implementing Section 103, Congress made it quite plain that the Commission's rule must "*meet the assistance capability requirements of section 103.*" CALEA § 107(b)(1) (emphasis added). A rule that discards certain capabilities on the ground that they would cost "too much" would *not* "meet the assistance capability requirements of" that section, and thus would be

fundamentally inconsistent with Congress's clearly expressed intent. See DOJ/FBI FNPRM Reply Comments (filed Jan. 27, 1999) 9-10; DOJ/FBI FNPRM Comments (filed Dec. 14, 1998) 11-12.[1]

II. The Record Before The Commission Offers No Support For The Conclusion That The Punch List Would Dramatically Increase The Cost Of CALEA Compliance.

One other commenter agrees with the government's position that, if the Commission proposes to rely on the information appended to the Public Notice, it should afford interested parties a more meaningful opportunity to comment on that information. See Sprint PCS Comments 2-3 & n.4.[2] The government respectfully reiterates its request that the Commission, if it decides to treat these data as relevant to its task in this proceeding, ensure that interested parties have a more meaningful opportunity to comment on the information.

At the same time, the government notes that, even on the record now before the Commission, it is clear that the cost assertions underlying the carriers' most emphatic argument for rejecting the punch list is meritless — inflated as they are, the manufacturers' revenue estimates are fundamentally inconsistent with the carriers' dramatic assertions regarding the financial burdens of CALEA compliance. Indeed, two carriers expressly acknowledge this striking inconsistency. See SBC Comments 1; AirTouch Comments 5. Thus, even if the carriers' cost-based argument for rejecting

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[1] Insofar as an individual carrier can demonstrate that compliance is not "reasonably achievable" for it, of course, it may seek relief under Section 109 regardless of the outcome of this proceeding. The Commission has properly determined that this proceeding is taking place under Section 107(b), not Section 109(b). See FNPRM ¶ 144.

[2] Two other commenters argue that using the aggregated estimates to support a decision that favors their position is acceptable, but using it to support a decision favoring the government's position would be unacceptable — a sort of 'heads we win, tails you lose' theory. See PrimeCo Comments 4; AirTouch Comments 6. Neither of these commenters explains why the procedural issues raised by this use of confidential information would be problematic only insofar as it might be used against their interests.

the punch list capabilities could find any purchase in the language of CALEA, it could find no support in the present record.

Furthermore, as the government demonstrated in its prior filing, see Comments Regarding CALEA Manufacturer Revenue Estimates (filed May 17, 1999) (Comments) 5-8, the manufacturer revenue estimates themselves appear to be substantially higher than the actual costs the carriers will incur in obtaining CALEA solutions. Importantly, the only commenter to address the question of purchase discounts reinforces the government's argument that, to the extent that they do not account for such discounts, the manufacturers' revenue estimates are a great deal higher than the actual costs of obtaining CALEA solutions will be. Specifically, the Cellular Telecommunications Industry Association (CTIA), which describes itself as "the international organization of the wireless communications industry for both wireless carriers and manufacturers" (CTIA Comments 1 n.1), states that a manufacturer may discount its sale price "as much as 40%" in negotiations with the government. *Id.* 4 n.7. Although CTIA does not specifically address the availability of discounts to carriers (as distinguished from the government), its acknowledgment of the possibility of substantial purchase discounts tends to support the government's observation that the actual purchase prices of CALEA solutions are likely to be substantially lower than the manufacturers' "list" prices. See Comments 6.

CTIA's suggestion that the Commission should nevertheless ignore the probability that such discounts will be granted is meritless. "List" prices simply do not reflect the actual cost that will be incurred by any carrier in implementing CALEA. CTIA discusses the Commission's reference to a possible government "buyout" plan, and observes that even if such a plan is pursued, some CALEA implementation may be accomplished through negotiations between manufacturers and individual

carriers. CTIA Comments 5-6. At the most, this observation could have some relevance to the possible *magnitude* of the discounts that will be offered; it could not require the Commission to ignore discounts altogether. More importantly, however, CTIA overlooks the obvious fact that carriers, unlike the government, are industry repeat customers that have ongoing and (generally) longstanding relationships with the manufacturers, and thus may well be in a stronger, rather than a weaker, negotiating position than the government.

As the government noted previously (Comments 10-11), if it believes that cost data are essential, the Commission can obtain a better idea of the actual costs of obtaining CALEA solutions by relying on completed negotiations that will yield the actual prices to be paid by carriers. Alternatively, the Commission could require the manufacturers to divulge their estimates of the costs they will incur in developing CALEA solutions. Because the statute requires manufacturers to make CALEA solutions available to their carrier customers "at a reasonable charge," 47 U.S.C. § 1005(b), the Commission could derive the carriers' costs by determining what charges would be "reasonable" in light of the manufacturers' development costs. The Commission should not, however, rely upon aggregated revenue projections that are based on non-discounted price estimates and that incorporate a plethora of faulty assumptions. See Comments 5-8.

In generally seeking to argue that the manufacturers' estimates understate the relevant costs, the carriers likewise rely upon faulty premises. The carriers persist in making generalized assertions about the overall costs of CALEA compliance,[3] and yet they do not identify any flaw in the

[3] See CTIA Comments 2; BellSouth Comments 3; USTA Comments 2; U S West Comments 2; see also Sprint PCS Comments 4 (complaining that complying with the *J-Standard* will require the carrier to use four different "delivery boxes").

Commission's conclusion that its duty in this proceeding is to review only the *contested* assistance capabilities (see FNPRM ¶ 45), and in fact, another commenter (claiming to speak for "tens of thousands of FCC licensees") expressly concedes that the Commission "is only evaluating whether the contested requirements * * * meet the assistance capability requirements of Section 103" (PCIA Comments 1 nn.1,4). The carriers also generally persist in ignoring the fact that the Commission must address the need to correct each relevant deficiency in the J-Standard individually, rather than simply determining whether to accept or reject the punch list *in toto*. See FNPRM ¶¶ 73-128 (discussing each punch list item individually, tentatively accepting six, and tentatively rejecting three items); DOJ/FBI FNPRM Reply Comments (filed Jan. 27, 1999) 12. And like the manufacturers who submitted these revenue estimates, the carriers still generally have not proffered alternative methods of curing individual deficiencies in the J-Standard that they believe would be less expensive, suggesting that they are aware of no more "cost-effective" means of curing the identified deficiencies in the J-Standard than the means the government has suggested in the punch list. See DOJ/FBI FNPRM Reply Comments (filed Jan. 27, 1999) 13.[4]

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[4] The only exception is a commenter that reiterates suggestions raised in prior carrier filings regarding alternatives to the "post-cut-through" dialing punch list item. See PCIA Comments 4. The government has already explained, however, that these suggestions are fundamentally misguided. Law enforcement has the legal authority to collect call-identifying information pursuant to pen register orders, and requiring law enforcement to meet the heightened requirements for a Title III content order to acquire post-cut-through digits would be inconsistent with CALEA and other electronic surveillance statutes. See DOJ/FBI Assistance Capability Reply Comments (filed June 12, 1998) 41. And requiring law enforcement to obtain "post-cut-through" dialing information through carriers other than the originating carrier would present a number of practical and cost-effectiveness problems, among them the potential inability of law enforcement to identify the relevant interexchange carrier or terminating carrier on a timely basis, and the need for carriers to monitor every incoming call to determine whether any originated from the facilities of a subscriber covered by a surveillance order. See DOJ/FBI FNPRM Comments (filed Dec. 14, 1998) 68-69.

Furthermore, most carriers make no effort to specify the portion of their estimated costs that will actually be "costs" to them — *i.e.*, that will not be reimbursed by the government. The notable exception is a carrier that candidly states that "landline carrier implementation of the J-Standard/punch list should have *little impact on the rates paid by landline customers*" because the government "presumably will pay for most of the cost that landline carriers are projected to incur." Sprint PCS Comments 5 (emphasis added). Obviously, this carrier's comment tends to undermine the carriers' general theme that requiring the punch list would place "enormous" new burdens on ratepayers. GTE FNPRM Comments (filed Dec. 14, 1998) 9.[5]

The two carriers that do address the prospect of government reimbursement suggest placing strange significance upon it. One commenter asserts that any Section 103 capability that would cause the costs of CALEA compliance to exceed $500 million (the amount that has thus far been appropriated by Congress for CALEA reimbursement) must be considered inconsistent with Congress's intent. See PrimeCo Comments 4 n.11. This theory overlooks the fact that Congress included a "grandfather" date in CALEA, and provided that the appropriated funds would *not* be

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[5] As the quotation indicates, this carrier's concession relates only to the wireline portion of the industry, and the carrier goes on to argue that CALEA costs will be "rate-impacting" for mobile customers. Sprint PCS Comments 6; *cf.* CTIA Comments 7-8 (discussing the costs per wireless switch). However, any examination of the costs affecting the wireless portion of the industry must be undertaken with a view to the fact that an individual wireless switch tends to reach many more subscribers, and to generate substantially more revenues, than a typical wireline switch. According to CTIA's 1998 Semi Annual Survey, the annualized total revenues for the cellular, ESMR, and PCS portions of the industry were over $33 billion, and accepting CTIA's estimate of the total number of wireless switches (829) (CTIA Comments 7), this yields a per-wireless-switch revenue estimate of nearly $40 million. Even if the per-wireless-switch costs of complying with both the J-Standard and the punch list were as high as $1 million — which the government strongly doubts, for the reasons set forth in this and its previous comments — this amount would represent only 2.5% of the revenue generated by a typical wireless switch in a single year.

used to reimburse post-"grandfather"-date equipment unless a carrier could demonstrate, to the Commission's satisfaction, that compliance would not be "reasonably achievable" without a government subsidy. 47 U.S.C. § 1008. Indeed, the statutory criteria established by Congress for evaluating "reasonable achievability" presuppose that some portion of the costs associated with CALEA compliance will ultimately be borne by the industry, rather than by the government. See 47 U.S.C. § 1008(b)(1)(B) (referring to the effect on "rates for basic residential telephone service"); *id.* § 1008(b)(1)(H) (referring to the "financial resources of the [applicant] telecommunications carrier").

Another commenter urges that "any CALEA costs greater than the $500 million authorized by Congress for CALEA compliance will impose substantial costs on ratepayers." U S West Comments 1. Even if this claim were revised to refer to "substantial" costs in excess of $500 million, it would make no sense. Assuming that the carriers will refuse to take any of the unreimbursed compliance costs out of their many billions of dollars in annual profits — according to the Commission's Statistics of Common Carriers, in 1997 alone the reporting local exchange companies reported $11.5 billion of "pure" profit[6] — and will pass the entirety of these costs on to the ratepayers, the unreimbursed costs would still be spread across more than 240 million wireline and wireless ratepayers, see FCC Trends in Telephone Service (Feb. 1999) (over 172 million switched access lines); CTIA Comments 7 (69,209,321 wireless subscribers reported in CTIA survey), and may also be spread over several years' worth of bills.

[6] "Pure" profit refers to profit after the deduction of interest, taxes, depreciation, and amortization.

Many commenters focus on expenditures that are not actually "costs" to the carriers. For example, some carriers refer to "operational" or "monthly recurring" costs, evidently seeking to imply that the regular process of assisting the government in conducting electronic surveillance imposes CALEA "costs" on the industry. See CTIA Comments 3; Sprint PCS Comments 4; SBC Comments 3 n.3. But not only would these "costs" be incurred even in the absence of CALEA, they are not costs to the industry at all, because most carriers charge law enforcement on a per-use basis for providing the sort of ordinary wiretapping assistance that they have been providing since long before CALEA was enacted. See 18 U.S.C. § 2518(4) ("Any provider of wire or electronic communication service [furnishing technical assistance for the implementation of electronic surveillance] shall be compensated therefor * * * for reasonable expenses incurred"); 18 U.S.C. § 3124(c) (same for pen register surveillance). Carriers also refer to capacity-related expenses, see SBC Comments 2; CTIA Comments 3; USTA Comments 2, ignoring the fact that eligible capacity costs will be reimbursed by the government. See 47 U.S.C. § 1003(e); Comments 7.[7]

Finally, several commenters refer to the information that the government has received from manufacturers pursuant to non-disclosure agreements, and charge that the government has "refus[ed]" to make this information part of the record. BellSouth Comments 3; see also PrimeCo Comments 4; CTIA Comments 2 n.3; USTA Comments 2; AirTouch Comments 2 n.1. With apologies to the Commission for what must seem unnecessary repetition, the government reiterates that it does not believe that it can place these data into the record, even in aggregate form, without

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[7] On the more technical level, one commenter claims that the provision of the "in-band and out-of-band network signaling" capability would require the extension of a full-time call content channel for every pen register surveillance. See SBC Comments 2. In fact, this capability requires only that carriers deliver notification messages to law enforcement, not call content.

violating the applicable non-disclosure agreements. See DOJ/FBI FNPRM Reply Comments (filed Jan. 27, 1999) 20; DOJ/FBI FNPRM Comments (filed Dec. 14, 1998) 16; DOJ/FBI Assistance Capability Reply Comments (filed June 12, 1998) (June Reply Comments) 36-37 n.21. As early as June 12, 1998 (see DOJ/FBI Assistance Capability Reply Comments 37 n.21), the government noted that it would release these data to the Commission if the manufacturers gave it permission to do so. And as recently as ten days ago, the government suggested a means by which this information could be made part of the record, requesting in publicly-filed comments that the Commission "condition its grant of the [manufacturers'] confidentiality requests on the manufacturers' agreement to release the government from the restraints imposed by non-disclosure agreements." Comments 5; see also Petition for Reconsideration (filed Mar. 31, 1999) 7-8 (same). It is not clear what more the government can do. It is clear, however, that allegations that the government has "sat on" this information (AirTouch Comments 6 n.12) are baseless.

In summary, for the reasons stated in this and the government's prior filings, the Commission should not consider the aggregated manufacturer revenue estimates relevant to its task in this proceeding. If it should nevertheless decide to consider these numbers relevant to its task, the Commission should grant interested parties a more meaningful opportunity to comment on them. Even if these numbers must be taken at face value, however, they thoroughly undermine the carriers' argument that including the punch list capabilities in the Commission's "safe harbor" rule would place intolerable financial burdens on them.

DATE: May 27, 1999

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Certificate of Service

I, Michael Gallagher, a Program Analyst in the office of the Federal Bureau of Investigation, Washington, D.C., hereby certify that, on May 27, 1999, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Comments Regarding CALEA Manufacturer Revenue Estimates, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 27th day of May, 1999.

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